

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers)	CC Docket No. 01-338
)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996)	CC Docket No. 96-98
)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability)	CC Docket No. 98-147

OPPOSITION OF MCI, INC.

Pursuant to the Public Notice released by the Federal Communications Commission (“Commission”) on October 5, 2004, MCI, Inc. (“MCI”) respectfully submits this Opposition in response to the Petition for Reconsideration or, in the Alternative, Petition for Clarification filed by Mountain Telecommunications, Inc. (“Mountain Telecom”) in the above-captioned matter.¹

MCI opposes Mountain Telecom’s Petition. Specifically, MCI opposes Mountain Telecom’s request that volume-based discounts for the purchase of network elements be limited to volumes purchased for any one state. Rather, the Commission should retain the current statement and interpretation of its network element nondiscrimination pricing rule, which provides – based on well-established legal precedent, policy, business principles, and economics – that competitive local exchange carriers (“CLECs”) capable of making multistate volume

¹ Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, Report No. 2675, *Public Notice* (rel. Oct. 5, 2004). The *Public Notice* was published in the Federal Register on October 12, 2004. 69 Fed. Reg. 60626 (Oct. 12, 2004).

commitments are permitted to obtain discounts that are fully reflective of those commitments and volumes.²

I. INTRODUCTION

On July 13, 2004, the Commission released the *Second Report and Order* in CC Docket No. 01-338, in which it replaced the Section 252(i) “pick-and-choose rule” with the “all-or-nothing” rule, requiring CLECs to adopt all of the provisions of an incumbent local exchange carrier’s (“ILEC’s”) interconnection agreement with another CLEC if they wished to adopt any of the provisions.³ Although the Commission’s decision to replace the pick-and-choose rule marked a fundamental change in its approach to negotiations between CLECs and ILECs, the Commission retained a nondiscrimination provision in order to prevent carriers from gaming the all-or-nothing rule.

One of the functions of the nondiscrimination provision is to prevent ILECs from using “poison-pill” contract terms to prevent broad adoption by other CLECS of a contract with a particular CLEC.⁴ Pursuant to the provision, ILECs are not permitted to place unjustified provisions in an agreement with a CLEC that, while not bothersome to that particular CLEC, would make it virtually impossible for other CLECs to adopt the agreement, at least on the same

² Although MCI opposes Mountain Telecom’s Petition and advocates for upholding the Commission’s current statement and interpretation of the network element nondiscrimination pricing provisions, MCI does not support the Commission’s decision to replace the “pick-and-choose” rule with the “all-or-nothing” rule. MCI argued for retention of the pick-and-choose rule in the underlying rulemaking and it continues to adhere to its positions therein.

³ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, *Second Report and Order*, 19 FCC Rcd. 13494 (2004) (“*Second Report and Order*”); 47 U.S.C. § 252(i).

⁴ *Second Report and Order* at ¶ 22.

terms.⁵ The Commission indicated in the *Second Report and Order* that volume and term discounts are generally deemed justified and are not considered poison pills (thus reaffirming its own well-established precedent).⁶

In its Petition, Mountain Telecom, a single-state CLEC, requests that the Commission reconsider or clarify the nondiscrimination rule by providing that volume discounts for network elements be permissible only up to the state level.⁷ In other words, the Commission should prohibit ILECs from offering greater discounts to CLECs willing to purchase multistate volumes than they offer to CLECs willing to purchase only single-state volumes. Mountain Telecom essentially contends that because it is incapable of purchasing multistate volumes of network elements and thus getting multistate discounts, no other CLEC should be permitted to get multistate discounts, either.

Mountain Telecom's proposition is at directly odds with well-established Commission precedent and policy as well as sound business principles and economics. Its Petition is devoid of legal argument save for two unsupported paragraphs in which it tries – unconvincingly – to blend concepts of intrastate jurisdiction and multistate pricing agreements.⁸ As the Commission has recognized since it first implemented the Telecommunications Act of 1996 (“the 1996 Act”), the provision of legitimate volume discounts is appropriate and nondiscriminatory because, among other things, the greater the volume to which a CLEC is willing to commit, the greater

⁵ *Second Report and Order* at ¶ 22.

⁶ *Second Report and Order* at ¶ 22.

⁷ Petition for Reconsideration or, in the Alternative, Petition for Clarification, p. 3 (filed Aug. 23, 2004) (“Petition”).

⁸ Petition at pp. 3-4.

cost-savings the provisioning ILEC stands to realize.⁹ Also, the greater the volume to which a CLEC is willing to commit, the greater its business risk, and hence the more it will expect to be compensated for that risk in the form of a lower rate. These are fundamental economic principles that are true throughout nearly all industries, and there is no reason to truncate their application in telecommunications. Additionally, at a time when the Commission is actively encouraging ILECs and CLECs to engage in “more ‘give-and-take’ negotiations” and reach “creative agreements that are better tailored to meet carriers’ individual needs,”¹⁰ taking away an important incentive and negotiating tool for the nation’s largest competitive carriers would be antithetical to the promotion of competition.

II. MULTISTATE VOLUME DISCOUNTS ARE PERMISSIBLE AND NONDISCRIMINATORY

The Commission has permitted volume discounts for network elements since the implementation of the 1996 Act,¹¹ and Mountain Telecom does not argue against such discounts as a general matter. Indeed, it specifically notes its ability “to make significant volume commitments to Qwest for unbundled transport in Arizona.”¹² Rather, it only advocates against allowing such discounts on the multistate level, a level which it is not currently large enough to

⁹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499, ¶¶ 1315, 1317 (1996) (“*First Report and Order*”) (“that one carrier has negotiated a volume discount on loops does not automatically entitle a third party to obtain the same rate for a smaller amount of loops”).

¹⁰ *Second Report and Order* at ¶ 1.

¹¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499, ¶¶ 1315, 1317 (1996).

¹² Petition at p. 3.

reach.¹³ But if all the policy, business, and economic rationales for volume discounts are valid for the various levels leading up to the multistate level, how can it credibly be argued that volume discounts suddenly become discriminatory once they reach the multistate level? Such a proposition cannot stand. The underlying rationales for volume discounts remain the same for all volume levels and, thus, so should the rules.

A. Volume Discounts Are Permissible and Important For The Promotion Of Competition

In the course of implementing the 1996 Act, the Commission unequivocally concluded in the *First Report and Order* that volume discounts are permissible.¹⁴ Its conclusion included a discussion of how volume discounts may be differentiated on cost-based grounds, and nothing in its language indicated such discounts could somehow become discriminatory simply because they reached the multistate level.¹⁵ Rather, the Commission's language indicated that the permissibility of volume discounts should be based on whether the provision of the discount is economically rational and effectively made available to all carriers willing to accept their requirements – concepts that easily accommodate multistate discounts.¹⁶

In the *First Report and Order*, the Commission found that with regard to pricing network elements, cost-based differences in rates are not only permissible, they are highly important to competition.¹⁷ The Commission stated:

¹³ Petition at p. 3.

¹⁴ *First Report and Order* at ¶¶ 859-860.

¹⁵ *First Report and Order* at ¶¶ 859-860.

¹⁶ *First Report and Order* at ¶¶ 859-860.

¹⁷ *First Report and Order* at ¶¶ 859-860.

As one economist has recognized, differential pricing is “one of the most prevalent forms of marketing practices” of competitive enterprises. Strict application of the term “nondiscriminatory” as urged by those commenters who argue that prices must be uniform would itself be discriminatory according to the economic definition of price discrimination. If the 1996 Act is read to allow no price distinctions between companies that impose very different interconnection costs on LECs, competition for all competitors, including small companies, could be impaired. *Thus, we find that price differences, such as volume and term discounts, when based upon legitimate variations in cost are permissible under the 1996 Act, if justified.*¹⁸

Also in the *First Report and Order*, the Commission applied this theory of competitive price differentiation specifically to the Section 252(i) pick-and-choose rules (now the all-or-nothing rules), finding that “section 252(i) permits differential treatment based on the LEC’s cost of serving a carrier.”¹⁹ The Commission recognized that individual aspects of particular interconnection agreements could influence the amount it costs ILECs to provide elements and services pursuant to the agreement, with the result that “agreements [shall] be made available only to carriers who cause the incumbent LEC to incur no greater costs than the carrier who originally negotiated the agreement, so as to result in an interconnection agreement that is both cost-based and technically feasible.”²⁰ The Commission again expressly noted the permissibility of volume discounts, stating:

[W]here an incumbent LEC and a new entrant have agreed upon a rate contained in a five-year agreement, section 252(i) does not necessarily entitle a third party to receive the same rate for a three-year commitment. *Similarly, that one carrier has negotiated a volume discount on loops does not automatically entitle a third party to obtain the same rate for a smaller amount of loops.*²¹

¹⁸ *First Report and Order* at ¶ 860 (emphasis added).

¹⁹ *First Report and Order* at ¶ 1317.

²⁰ *First Report and Order* at ¶ 1317.

²¹ *First Report and Order* at ¶ 1315 (emphasis added).

More recently, in the *Second Report and Order*, the Commission affirmed its general statements that volume discounts are not per se discriminatory.²² In the underlying rulemaking, LecStar Telecom had alleged that agreements between ILECs and large CLECs could sometimes be deemed to contain poison pills because they may contain terms that can only be fulfilled by large CLECs.²³ The Commission, in response, took no action against agreements between ILECs and large CLECs. Rather, it reiterated that “volume or term discounts may be included in agreements so long as the volume or term of the discount is not discriminatory,” and referenced nondiscrimination language in the *First Report and Order*.²⁴ Although LecStar’s allegation gave the Commission the opportunity to prohibit multistate volume discounts, it chose not to do so.

B. Multistate Volume Discounts Are Nondiscriminatory And There Is No Reasonable Basis Upon Which To Prohibit Them

Mountain Telecom has not presented a reasonable basis upon which to prohibit multistate volume discounts. As explained above, price differentiation for network elements, including the use of volume discounts, does not constitute discrimination if the differentiation is cost-based and provided equally to all carriers willing to accept the involved requirements. Those criteria do not contain volume ceilings, either inherent or Commission-imposed. If an ILEC may realize cost benefits by contracting for a statewide volume of a network element, it may likewise realize even greater cost benefits by providing a multistate volume. That analysis and decision is best made by the ILEC and the contracting CLEC.

²² *Second Report and Order* at ¶ 22.

²³ *Second Report and Order* at ¶ 22; LecStar Telecom Comments at 5.

²⁴ *Second Report and Order* at ¶ 22.

The concept of encouraging ILECs and CLECs to freely negotiate interconnection agreements was at the core of the Commission's decision to replace the pick-and-choose rule with the all-or-nothing rule. In the *Second Report and Order*, the Commission stated that it sought to "promote more 'give-and-take' negotiations, which will produce creative agreements that are better tailored to meet carriers' individual needs."²⁵ It sought to "allow this regime to have the broadest possible ability to facilitate compromise."²⁶ To that end, ILECs should not be prohibited from passing cost savings, in the form of volume discounts, on to CLECs that are willing to commit to multistate volumes. Likewise, multistate CLECs should not be denied the benefits of multistate discounts, especially given the current tumultuous state of the CLEC sector. Not only would denying CLECs a legitimate discount prevent them from passing the cost savings on to consumers in the form of lower rates, it may prevent them from reaching agreements at all. There is simply no way to square the requested prohibition on multistate discounts with the Commission goal of promoting competition.

Also, given the population disparity between states (and hence disparity in cost of providing statewide service), a rule flatly prohibiting multistate volume discounts would be inherently arbitrary. For example, it would be absurd for the Commission to craft a rule permitting a statewide volume discount for California, with an estimated population of approximately 34.5 million people, but prohibiting a multistate volume discount for Vermont,

²⁵ *Second Report and Order* at ¶ 1.

²⁶ *Second Report and Order* at ¶ 10.

New Hampshire, and Maine, with a combined estimated population of approximately 3.2 million people.²⁷

Mountain Telecom argues that unbundled network elements are used by CLECs to provide local service and, thus, volume discounts should be limited to the state level.²⁸ According to Mountain Telecom, ILEC provision of multistate volume discounts would constitute price discrimination against non-multistate CLECs.²⁹ This argument makes no sense and Mountain Telecom provides no legal citation for it. Matters of intrastate service versus interstate service have no bearing on whether the prices to which a willing ILEC and a willing CLEC voluntarily agree are discriminatory. It is well established that whether prices are discriminatory depends on whether they are cost-based and offered to all carriers willing to meet their requirements.³⁰ For the Commission to prohibit multistate competitive carriers from legitimately obtaining the best possible rates for network elements – and hence prevent them from offering the best possible rates to consumers – would be directly contrary to precedent and the goals of the 1996 Act.

²⁷ United States Census Bureau Annual Estimates of the Population by Sex and Age, July 1, 2003, United States Census Bureau web site at <http://www.census.gov/popest/states/asrh/SC-EST2003-02.html>.

²⁸ Petition at 3-4.

²⁹ Petition at 3-4.

³⁰ *First Report and Order* at ¶¶ 859-860.

III. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, MCI respectfully asks the Commission to act in the public interest by denying Mountain Telecom's Petition for Reconsideration or, in the Alternative, Petition for Clarification.

Respectfully submitted,

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I, Michelle Lopez, hereby certify that on this 27th day of October, 2004, copies of the foregoing were served by regular mail, unless otherwise noted, on the following:

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